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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 651

KENNETH JOHN BERRY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1959

KENNETH JOHN BERRY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kenneth John Berry prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit affirming his conviction for unlawfully causing interstate transportation of a forged security in violation of 18 U.S.C. 2314.

Opinion Below

The District Court for the Southern District of Florida did not render an opinion. The opinion of the Court of Appeals is reported at 271 Fed. 2d 775, and is reproduced as Appendix "A" to this petition.

Jurisdiction

The opinion (Appendix "A") and judgment (Appendix "B") of the Court of Appeals are dated November 23,

1959, and a petition for rehearing, timely filed, was denied on December 21, 1959 (Appendix "C"). Leave to file a second petition for rehearing was denied January 13, 1960 (Appendix "D"). By order dated January 14, 1960, Mr. Justice Black enlarged the time for filing this Petition to and including February 19, 1960. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. In a trial for unlawfully causing interstate transportation of a forged security, may the trial judge instruct the jury that a conviction will lie even though the defendant's intent was lawful?

2. Has a defendant enjoyed due process of law when the trial judge wholly fails to instruct the jury as to the elements of the offense?

Constitutional Provisions, Statutes and Rules of Procedure Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

Section 2314, Title 18, United States Code, provides:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

"This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. (June 25, 1948, ch. 645, 62 Stat. 806; May 24, 1949, ch. 139, § 45, 63 Stat. 96; July 9, 1956, ch. 519, 70 Stat. 507.)"

Rule 52(b), Federal Rules of Criminal Procedure, provides:

> "(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Statement of the Case

The petitioner was charged (R. 1) with the offense of unlawfully causing interstate transportation of a "falsely made and forged" traveler's check drawn on the "Exchange National Bank of New York." There was evidence that he cashed the check in a Florida supermarket (R. 8-10), that he had cashed a similar check in a bar (R. 33-36, 67-68), that he had given another man several similar checks to cash (R. 43-51), and that there is no "Exchange National Bank of New York" (R. 37-42, 74-78).

The trial court's charge to the jury appears at pp. 105-110 of the record. It largely consists of instructions on reasonable doubt, burden of proof, credibility of witnesses, the presumption of innocence, and similar general propositions of law. Only the following three paragraphs of the charge might be said to deal with the law of this particular case:

> Par. 1. (R. 105-106) "Lady and gentlemen of the jury, one of the means of bringing a person to trial for a federal offense is by way of Information filed by the District Attorney. That has been done in this case. I am not going to read the Information to you because it is short. It contains one count, has one count, and it contains the charge on which this defendant is being tried, and you are going to be per-

mitted to take it to your jury room, and you can read it and understand it better perhaps in that manner than if you just heard it read."

Par. 3. (R. 106). "This Information, however, is based upon the following provision of the statute. That is, the Information charges the defendant with a violation of this provision. 'Whoever with lawful (sic) or fraudulent intent transports in interstate or foreign commerce any falsely made forged altered or counterfeit securities knowing the same to have been falsely made, forged or counterfeited . . .' and then it goes on to provide the penalty for such violation."

Par. 4. (R. 106). "I know some of you members of the jury and perhaps all have served considerably around here in the last two weeks in criminal cases and you are no doubt pretty well aware of the rules of law applicable in a criminal case."

The defendant's lawyer made no objection to the charge (R. 110).

Reasons for Granting the Writ

This conviction mocks the concept that a jury's verdict involves an application of proven facts to a formal legal accusation, as explained by a trial judge's charge. Instructions which at least conform to some minimal standards are so important in our system of determining guilt and innocence that this court should strike down petitioner's conviction and re-emphasize the responsibility of trial judges in this area of law.

The statute (18 USC 2314) fashions a crime out of certain acts committed with "unlawful or fraudulent intent." The Information (R. 1) alleges that this petitioner acted with an "unlawful or fraudulent" intent. Nevertheless,

less, the trial judge told the jury that the law prohibits certain acts whether committed with "lawful or fraudulent" intent (R. 106).

> "A conviction ought not to rest upon an equivocal direction to the jury on a basic issue." *Bollenbach v. United States*, 326 U.S. 607, 613; *M. Kraus & Bros. v. United States*, 327 U.S. 614, 627.

The instruction in this case was not "equivocal"—it was plain error (see Rule 52(b), Federal Rules of Criminal Procedure), and as this court has said:

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the appropriate legal criteria." *Bollenbach v. United States*, *supra*, 326 U.S. 607, 612.

Even if the petitioner's intent made no difference, these instructions still do not tell the jury what acts petitioner must have done to be convicted. A defendant has, of course, a "fundamental right" to "be convicted of crime only on proof of all the elements of the crime charged against him." *Christoffel v. United States*, 338 U.S. 84, 90.

The Fifth Circuit itself has recognized that instructions almost exactly like those given here are completely inadequate, stating:

> "An examination of the charge as to Count 1 of the indictment shows that it constitutes chiefly a reading by the court to the jury of all of Section 301 and of Count 1. Not a word is said as to exactly what is charged in the count, nor of what proof is necessary under it. We think this amounts to there having been virtually no charge, and, therefore, there is reversible error. *Campbell v. United States*, 167 F. 2d 451, 453."

Scrutiny of the Information and the testimony in this record might lead one to believe that petitioner was suspected of a crime consisting at the very least of these legal ingredients:

1. That the document identified as Government Exhibit 3 was transported in interstate commerce on or about the date alleged;

2. That this document is a security;

3. That this document was falsely made and forged.

4. That the interstate transportation of this document, if any, was caused by Kenneth John Berry;

5. That Kenneth John Berry knew this document was falsely made and forged; and

6. That Kenneth John Berry, in causing the interstate transportation of this document, if any, had an *un*lawful or fraudulent intent.

Never having been told that each of these elements must be proved beyond reasonable doubt, the jurors were necessarily left to their own devices in determining what it was necessary for the government to prove. It is worthy of note that although the Information alleged that the petitioner "caused" interstate transportation of a forged security, the emasculated version of the statute which the trial judge read to the jury (R. 106) dealt only with actual transportation.

It is true that petitioner's trial counsel did not object to the charge (R. 110). It has long been established, however, that, "In a criminal case the court must instruct on all essentials of law involved, whether or not it is requested to do so." See *Samuel v. United States*, 169 F. 2d 787, 792 (C.A., 9), citing cases from the 2nd, 3rd,

9th, 10th, and District of Columbia circuits. See also the Fifth Circuit's opinion in *Lott v. United States*, 218 F. 2d 675, 680-681 (footnote 7).

This court has repeatedly emphasized that failure to except to a charge which does not correctly set forth the essential law of the case does not defeat an appeal. See *United Brotherhood v. United States*, 330 U.S. 395, 411-412; *Terminiello v. Chicago*, 337 U.S. 1, 5; and Rule 52(b), Federal Rules of Criminal Procedure.

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed." *Screws v. United States*, 325 U.S. 91, 107.

Certainly the mandatory requirement for instructions on the basic law of the case was not satisfied by the trial judge's assumption (R. 106) that:

> "I know some of you members of the jury and perhaps all have served considerably around here in the last two weeks in criminal cases and you are no doubt pretty well aware of the rules of law applicable in a criminal case."

If anything, this observation raises the distinct possibility that the petitioner was convicted on the basis of instructions given the jurors at other trials, which are not contained in this record and to which this petitioner's lawyer had no way of objecting.

> "The verdict is not merely a report upon the facts; it is a legal decision that the facts laid before (the jury) do or do not fit the essential elements of a social proscription, the violation of which entails a penalty." *Morris v. United States*, 156 F. 2d 525, 531 (C.A., 9).

Because the essential elements of the offense were never explained to the jury, there has never been a verdict in this case which embodies the legal conclusions necessary for conviction. The failure of the trial judge to place the jurors in a position to perform their constitutional function is certainly a denial of the due process of law guaranteed by the Fifth Amendment, if not an actual denial of the jury trial contemplated by the Sixth Amendment.

So that instructional standards in the federal courts do not become as lax as this record would indicate, this court should grant a writ of certiorari and demonstrate the importance of the trial judge's duty to provide a legal framework for the jury's verdict.

Conclusion

For the reasons stated, a writ of certiorari should issue and the conviction should be reversed.

Respectfully submitted,

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Houston 2, Texas
Counsel for Petitioner

Certificate

I certify that copies of the above and foregoing petition were dispatched to the Solicitor General, Department of Justice, Washington 25, D.C., and to Miss Lavinia L. Redd, Assistant United States Attorney, United States Court House, Miami, Florida, air mail postage prepaid, this 18th day of January, 1960.

WILLIAM F. WALSH, ESQ.

APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 17751

KENNETH JOHN BERRY, *Appellant*,
versus
UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Florida

---

(November 23, 1959)

Before HUTCHESON, TUTTLE and WISDOM, Circuit Judges.

HUTCHESON, Circuit Judge: Appealing from his conviction and sentence on a one count indictment charging him with causing the transportation in interstate commerce of a falsely made and forged security with unlawful and fraudulent intent, knowing the same to have been falsely made and forged, defendant is here urging two specifications of error.

One of these is that a judgment of acquittal should have been, and should be here, directed. The other, in the alternative, is that the judgment should be reversed and the cause remanded because of the admission of evidence, tending to prove the commission of other of-

fenses than the one charged, and the failure to instruct the jury as to the limited purpose and effect of such evidence.

As to the first ground of error, with respect to which the appellant confidently relies on the Hubsch case from this court, 256 F(2) 820, appellee points out that in that case the instrument was a check on a bank and the defendant, admitting that he had made and signed the instrument, claimed only that in executing it he had not committed forgery because he had signed his own name, though an alias, while here the instrument was a travelers check and the defendant, disputing the testimony of the government's witnesses, denied that he had signed it or had anything to do with it.

As to the claimed procedural grounds of error, appellee points out that the evidence complained of was in itself admissible as tending to prove knowledge or intent. *Ehrlich v. U. S.*, 238 F(2) 481; *Anthony v. U. S.*, 256 F(2) 50; that the defendant did not object to its admission or request or suggest any limiting instructions; and that it has been held that failure to give such limited instructions is not error. *Fowler v. U. S.*, 242 F(2) 860; *Wright v. United States*, 192 F(2) 595.

We find ourselves in complete agreement with these views. The Hubsch case was not intended to, it did not, go beyond the "true name" doctrine. *Martinez v. United States*, 216 F(2) 761; *Great House v. United States*, 170 F(2) 512; Cf. *Edge v. United States*, F(2) The uncontradicted testimony in the Hubsch case showed that Hubsch made and passed the instrument in question and that he did not deny this but, on the contrary, freely admitted that he did, and the argument which this court sustained as to one count was; that A. A. Weinstein was his alias, a name by which he

was otherwise known and called; and that, without more, the drawing of a check in his own name on a bank in which he had no funds, though it would be a fraud or swindle, was not under the "true name" doctrine a forgery.

Far from asserting that defense here, appellant testified in his own behalf that he had not possessed or had anything to do with the travelers check in question. He did not at any time testify, nor does he now claim, that he had used as his, or had any connection as an alias with, the name Irving Rubin, appearing on the travelers checks. Besides what is in question here is not an ordinary check but a travelers check which, though it requires for negotiation the signature of the person to whom it is issued, is, when issued and signed by the payee, complete against, and cannot be countermanded by, the issuer. *Pines v. United States*, 123 F(2) 825. Such checks are cashed, not upon the credit of the persons negotiating them but upon the credit of the issuer and the correspondence of the endorsement of the negotiator with the signature on the face of the instrument. In the case, therefore, of such instruments, the first negotiator, if not the person to whom the check was issued, is necessarily a forger.

No reversible error attended the trial. The judgement was right and it is AFFIRMED.

A true copy
Test:

EDWARD W. WADSWORTH
Edward W. Wadsworth

(Seal)

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana, Jan. 7, 1960

APPENDIX B

JUDGMENT.

Extract from the Minutes of November 23, 1959.

KENNETH JOHN BERRY,

No. 17751. versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX C

Order Denying Rehearing

Extract from the Minutes of December 21, 1959

KENNETH JOHN BERRY,

No. 17751. versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.



APPENDIX D

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 17,751

KENNETH JOHN BERRY, *Appellant*,
versus
UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Southern District of Florida

---

ON MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

Before HUTCHESON, TUTTLE and WISDOM, Circuit Judges.

BY THE COURT:

IT IS ORDERED by the Court that leave to file second petition for rehearing in this cause be, and the same is hereby, denied.

(ORIGINAL FILED JANUARY 13, 1960)

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In the Supreme Court of the United States

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KENNETH JOHN BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 651

KENNETH JOHN BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 11–13) is reported at 271 F. 2d 775.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1959. A petition for rehearing was denied on December 21, 1959 (Pet. 15).[1] On January 14, 1960, Mr. Justice Black extended the time to file a petition for a writ of certiorari to February 19, 1960. The petition for a writ of certiorari was filed January 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Leave to file a second petition for rehearing was denied on January 13, 1960 (Pet. 16).

QUESTION PRESENTED

Whether the instructions to the jury, to which there was no objection at the trial, were so defective as to be subject to attack after affirmance of the judgment by the Court of Appeals.

STATUTE INVOLVED

18 U.S.C. 2314 provides in pertinent part:

* * * * *

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited * * *
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * *

STATEMENT

In the United States District Court for the Southern District of Florida, petitioner was convicted on one count charging a violation of 18 U.S.C. 2314 by the transportation of a false security in interstate commerce. He was sentenced to imprisonment for three years (R. 5–6).

The information (indictment having been waived, see R. 12–14) charged that on or about February 21, 1957, the petitioner, alias Irving Rubin, "did cause to be transported in interstate commerce a falsely made and forged security, to wit: Exchange National Bank of New York Traveler's Check bearing #197 in the amount of $50.00, signed and countersigned 'Irving

Rubin', with an unlawful and fraudulent intent, knowing the same to have been falsely made and forged" (R. 1). The evidence showed that there is no Exchange National Bank of New York (R. 74–78). Petitioner had cashed the check in a Florida supermarket (R. 8–10). He had also cashed a similar check in a bar (R. 33–35, 67–68) and had given another man several similar checks to cash (R. 43–51). Petitioner denied having or cashing the checks (R. 95).

In submitting the case to the jury, the judge said (R. 105):

> * * * I am not going to read the Information to you because it is short. It contains * * * the charge on which this defendant is being tried, and you are going to be permitted to take it to your jury room, and you can read it and understand it better perhaps in that manner than if you just heard it read.

The judge pointed out that the information was not evidence of guilt and not to be considered as such. He stated that it was based on a statute providing that "Whoever with lawful [sic] or fraudulent intent transports in interstate or foreign commerce any falsely made forged altered or counterfeit securities knowing the same to have been falsely made, forged or counterfeited" (R. 106).

After instruction on burden of proof and credibility, the judge said (R. 107):

> The defendant has pleaded not guilty. This puts the burden of proving the charge and each and every material element of the charge in the Information upon the Government and this burden never shifts to the defendant. You can-

> not find him guilty unless from the evidence you believe him guilty of the offense charged in the Information beyond a reasonable doubt.

The judge then charged on reasonable doubt and the presumption of innocence (R. 108).

Defense counsel made no objection to the charge, requesting only that the jury be told they were free to ask for the exhibits. This was done (R. 110).

The Court of Appeals affirmed the conviction against contentions that the evidence was insufficient and that it was error to permit proof of cashing of similar checks (Pet. 11–13). On a motion for leave to file a second petition for rehearing, which was denied (see fn. 1, *supra*, p. 1), new counsel raised issues as to the sufficiency of the instructions.

ARGUMENT

The sole issue raised in the petition is the sufficiency of the instructions, which were not challenged in either court below until the motion for leave to file a second petition for rehearing after affirmance by the Court of Appeals. The objection comes much too late. Rule 30, F.R. Crim. P. The instructions adequately enough presented the necessary issues to the jury. As the judge pointed out, the information, a copy of which was given to the jury, clearly stated the elements of the simple charge. The court instructed the jury that each element had to be proved beyond a reasonable doubt and he gave correct instructions as to reasonable doubt and the presumption of innocence. The necessity of finding unlawful intent appeared, not only from the charges of the information, but from the judge's reading of the statute. The slip of the

tongue when the judge read the statute as providing for "lawful" intent (see Pet. 5–6; *supra*, p. 3) was obviously not misleading since it was coupled with the word "fraudulent" and since the judge also read that part of the statute which provides that the defendant must know the security to have been falsely made, forged or counterfeit (R. 106). There is thus no occasion for this Court to review this conviction, which was amply supported by the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

FEBRUARY 1960.

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UNITED STATES OF AMERICA, *Respondent*

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

In this short reply, petitioner will not address himself to the government's argument that petitioner's objection to the trial court's charge comes too late. This court has already decided that question adversely to the government in the cases cited in the petition for certiorari (Pet. 7-8).

Petitioner feels it necessary to remark, however, that it is hardly fair to argue that the judge's instruction allowing a conviction even if petitioner's intent was lawful "was obviously not misleading since it was coupled with the word 'fraudulent' . . ." (Br. 5). It is true that the word "lawful" was "coupled" with the word "fraudulent", but it was "coupled" by the disjunctive "or", a "co-ordinating particle that marks an alternative; as, you may read or may write,—that is, you may do one of the things at your pleasure, but not both." *Webster's New International Dictionary (Unabridged)*, 2nd Ed., 1950, p. 1712.

Thus the jurors were left to choose between mutually exclusive alternatives, one of which was obviously incorrect. This is exactly what this court condemned when it said:

> "The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." *Bollenbach v. United States*, 326 U.S. 607, 613-614.

It is also not enough to suggest that the error is harmless "since the judge also read that part of the statute which provides that the defendant must know the security to have been falsely made, forged or counterfeit." (Br. 5.) Knowledge of the false character of the instrument is an element of the offense completely separate from the defendant's intent. If the government's theory of the case is correct some official of the New York clearinghouse undoubtedly knew that the security was falsely made when he caused its interstate transportation by returning it to Florida. Certainly such an official would not, however, also have the requisite criminal intent.

The completely inaccurate and inadequate nature of these instructions is too important, petitioner submits, to be dismissed casually as a "slip of the tongue" (Br. 4-5). This court has emphasized time after time that a defendant has a fundamental right to have the jury correctly instructed in the fundamental law of the case. In the

exercise of this court's supervisory responsibility over inferior federal courts, this court should again recognize the importance of the questions presented in this petition and should reverse this conviction, not only so that petitioner may have a trial at which his guilt or innocence is established by appropriate legal criteria, but also so that the attention of trial judges is redirected to the importance of their function in charging juries.

Respectfully submitted,

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Certificate

I certify that copies of the above and foregoing Reply to Brief in Opposition were dispatched to the Solicitor General, Department of Justice, Washington 25, D. C., and to Miss Lavinia L. Redd, Assistant United States Attorney, United States Court House, Miami, Florida, air mail postage prepaid, this 16th day of February, 1960.

William F. Walsh, Esq.